TENNESSEE REGULATORY AUTHORITY

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October 10, 2002

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

In Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996;* TRA Docket No. 97-00309

Dear Ms. Dortch:

Enclosed is the Advisory Opinion of the Tennessee Regulatory Authority ("Authority") relating to BellSouth Telecommunication's Inc. application pursuant to 47 U.S.C. § 271 for authorization to provide in-region, interLATA service in Tennessee. The Authority recommends that the application be granted.

Sincerely,

Sara Kyle
Chairman

Deborah Taylor Tate
Director

Pat Miller
Director

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

In Re: Docket No. 97-00309; *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*

ADVISORY OPINION TO THE FEDERAL COMMUNICATIONS COMMISSION

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This matter came before the Tennessee Regulatory Authority ("Authority" or "TRA") at a specially scheduled Authority Conference held on August 26, 2002 to consider the merits of the filings related to BellSouth Telecommunications, Inc.'s ("BellSouth's") application pursuant to 47 U.S.C. § 271.[1] The findings herein constitute the comments of the TRA to the Federal Communications Commission ("FCC") in this matter.

Background and Statutory Framework

With the passage of the Telecommunications Act of 1996 (the "Act"), Congress adopted a pro-competitive policy that fundamentally restructured local telephone markets by ending the monopoly of local service held by the incumbent Bell operating companies ("BOCs").[2] Congress designed the Act to "open[ ] all telecommunications markets to competition," by eliminating the barriers faced by competing local exchange carriers ("CLECs") when offering competing local telephone service.[3]

To stimulate effective competition, the Act requires BOCs to offer CLECs three means of gaining access to local telephone networks: [1] by selling local telephone services to the CLECs at wholesale rates for resale to end users; [2] by leasing network elements to CLECs on an unbundled basis; and [3] by interconnecting a requesting CLEC's network with their own.[4] Network elements and interconnection must be offered at "rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[5]

The Act allows BOCs to enter the interLATA long distance market in a particular state only after satisfying certain statutory criteria set forth in 47 U.S.C. § 271 and receiving the

[1] The voting panel in this docket consisted of Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Pat Miller.
[2] *See* 47 U.S.C. § 151 *et seq.; see also In the Matter of Bell Atlantic New York for Authorization under Section 271 of the Communications Act*, 220 F.3d 607, 611 (D.C. Cir. 2000).
[3] *Id.* (quoting S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)).
[4] *Id.* (citing 47 U.S.C. § 251(c)(2)-(4)).
[5] 47 U.S.C. § 251(c)(2)(D), (c)(3).

approval of the FCC.[6] No later than ninety (90) days after receiving a BOC's section 271 application, the FCC must issue a written disposition of the application. Prior to making any disposition under section 271, the FCC must consult with the United States Attorney General and with the State commission of the State that is the subject of the application in order to verify the compliance of the BOC with the requirements of subsection (c) of section 271. "The purpose [of these requirements] is to encourage these locally-dominant companies to open up their local markets to competition while preventing them from curtailing competition in the long-distance market or unfairly leveraging their own entry into that market."[7] The Act places on the BOC the burden of proving that all the requirements of section 271 are satisfied.

Section 271 provides a BOC with two avenues for satisfying this burden of proof in a section 271 application. The BOC may establish that it meets the requirements of 47 U.S.C. § 271(c)(1)(A) ("Track A") or 47 U.S.C. § 271(c)(1)(B) ("Track B"). Under Track A, the BOC must establish the presence of a facilities-based competitor by showing that the BOC has entered into one or more binding agreements that have been approved under 47 U.S.C. § 252 specifying the terms and conditions under which the BOC is providing access to and interconnection with its network facilities and the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers.[8] Such telephone exchange service may be offered by competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

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[6] *See* 47 U.S .C. § 271. A consent decree arising from a 1982 antitrust suit brought by the Department of Justice permitted incumbents to provide local service in their respective regions, but barred them from providing long distance services. *See SBC Communications, Inc. v. FCC,* 138 F.3d 410, 412 (D.C. Cir. 1998).

[7] *AT&T Corp. v. U.S. West Communications, Inc.,* No. C98-634WD, 1998 WL 1284190 at * 1 (W.D. Wash. June 4, 1998).

[8] *See* 47 U.S.C. § 271(c)(1)(A).

Track B provides the basis for filing a section 271 application even if no facilities-based competition exists in the state. The BOC must have filed a statement of the terms and conditions that the company generally offers to provide access and interconnection that has been approved or permitted to take effect by the state commission under 47 U.S.C. § 252(f).

BellSouth stated to the Authority that its section 271 application to the FCC seeking authority to provide in-region, interLATA service in the State of Tennessee would proceed under Track A.

The BOC must also satisfy the fourteen (14) point competitive checklist set forth at 47 U.S.C. § 271(c)(2)(B), prove that the requested authorization will be carried out in accordance with the requirements of 47 U.S.C. § 272 and demonstrate that the BOC's entry into the in-region, interLATA market is "consistent with the public interest, convenience and necessity."[9] The competitive checklist includes the following:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (i) Interconnection in accordance with the requirements of 47 U.S.C. §§ 251(c)(2) and 252(d)(1).
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1).
>
> (iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of 47 U.S.C. §§ 224.
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

[9] 47 U.S.C. § 271(d)((3)(C).

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to 47 U.S.C. § 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of 47 U.S.C. § 251(b)(3).

(xiii) Reciprocal compensation arrangements in accordance with the requirements of 47 U.S.C. § 252(d)(2).

(xiv) Telecommunications services are available for resale in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3).

Related Proceedings Before the TRA

In anticipation that BellSouth would seek the FCC's approval to provide in-region, interLATA service in Tennessee, the Authority convened several contested case proceedings, beginning in 1997, to explore a number of issues contemplated by or related to 47 U.S.C. § 271. Three of these dockets are summarized below. Two of these dockets have had particular impact on the resolution of the instant proceeding.[10]

Docket No. 97-01262: ***In re Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements.***

At a regularly scheduled Authority Conference on July 15, 1997, the Directors voted to commence a contested case proceeding (Docket No. 97-01262) to establish permanent prices for interconnection and unbundled network elements ("UNEs"). This proceeding was divided into two phases. In Phase I, the Authority determined the adjustments for each cost model presented. The Authority conducted hearings on the issues in Phase I on November 17-21 and 24, 1997 and February 23 and 25-27, 1998. The Directors of the Authority deliberated on the Phase I issues at a regularly scheduled Authority Conference held on June 30, 1998.

The Authority issued its *First Interim Order* on January 25, 1999. Therein, the Directors unanimously determined, *inter alia,* that the forward-looking cost methodology as defined by the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology, including an appropriate mark-up for recovery of shared and common costs, would be used to set permanent prices for UNEs in Tennessee. The Authority also directed the parties to submit cost studies supporting their costs.

[10] These dockets are Docket No. 01-00362: *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations* (the "OSS Docket") and TRA Docket No. 01-00193, *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.* (the "Performance Measurements Docket").

In Phase II, the Authority determined the prices for interconnection and UNEs based on the cost studies filed in compliance with the Authority's *First Interim Order*. The final prices were based on criteria specified by the Act and orders issued by the FCC, including the Local Competition Order.[11] The *Final Order,* issued on February 23, 2001, reflects the Authority's decisions to set permanent prices for collocation elements and UNE rates and requires BellSouth to issue tariffs containing UNE rates approved by the Authority, based on cost studies provided by BellSouth (the *Final Order* and the tariff containing the approved UNE rates are attached hereto respectively as Exhibit A and B).

Docket No. 01-00362: *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

On February 21, 2001, the Directors convened Docket No. 01-00362 to explore whether competing local exchange carriers ("CLECs") operating in Tennessee have nondiscriminatory access to BellSouth's Operations Support System ("OSS") as required by state and federal law.[12] The purpose of Docket No. 01-00362 (the "OSS Docket") was to determine whether existing data or test results derived from OSS testing in other states was reliable and applicable to Tennessee and, in those instances where reliance on such testing was inappropriate, to conduct necessary testing.

The OSS Docket was bifurcated into two phases. The focus of Phase I was to determine whether BellSouth's OSS is regional. Phase II focused on the reliability of existing third party testing of BellSouth's OSS in other states and whether CLECs were afforded nondiscriminatory

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[11] *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 95-185 (*First Report and Order*) (released August 8, 1996) 1996 WL 452885, 11 FCC Rcd. 15, 499 (hereinafter "Local Competition Order").

[12] "[T]he term OSS refers to the computer systems, databases, and personnel that incumbent carriers rely upon to discharge many internal functions necessary to provide service to their customers." *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, FCC Docket No. 98-72, CC Docket No. 98-56 (*Notice of Proposed Rulemaking*) (released April 17, 1998) 13 FCC Rcd. 12,817, ¶9.

access to BellSouth's OSS. After a Hearing held from December 3 through 6, 2001 focusing solely on the Phase I issue of the regionality of BellSouth's OSS, a majority of the Directors found that BellSouth failed to satisfy its burden of establishing that its pre-ordering, ordering, provisioning, maintenance and repair and billing systems are regional. The Authority deliberated this decision during the May 21, 2002 Authority Conference. The Authority's decision was memorialized in the *Order Resolving Phase I Issues of Regionality* issued on June 21, 2002.[13]

On July 8, 2002, BellSouth moved for reconsideration and reversal of that Order. On July 23, 2002, a majority of the panel assigned to Docket No. 01-00362 voted to grant BellSouth's *Motion for Reconsideration*, relying in part on a finding in the May 15, 2002 decision by the FCC approving BellSouth's application pursuant to 47 U.S.C. § 271 in Georgia and Louisiana that BellSouth's OSS does not distinguish between Georgia and Louisiana.[14] The panel's decision was memorialized in the *Order Granting Reconsideration of and Modifying the Order Resolving Phase I Issues of Regionality* issued on August 8, 2002 (attached hereto as Exhibit C).[15]

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[13] The majority's decision in the June 21, 2002 Order reflects the deliberations of Directors H. Lynn Greer, Jr. and Melvin J. Malone. Their terms as Directors of the Authority expired on June 30, 2002. Chairman Sara Kyle did not vote with the majority. Chairman Kyle was reappointed and commenced a new term as a Director of the Authority on July 1, 2002. Pursuant to the requirements of the amended provisions of Tenn. Code Ann. § 65-1-204, a three member voting panel consisting of Chairman Kyle and Directors Deborah Taylor Tate and Ron Jones was randomly selected and assigned to the OSS Docket.

[14] *See In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Service in Georgia and Louisiana,* CC Docket No. 02-35 (*Memorandum Opinion and Order*) (issued May 15, 2002) 2002 WL 992213, 17 FCC Rcd. 9018 ("Georgia/Louisiana Order").

[15] On August 27, 2002, BellSouth filed a Petition for Review in the Tennessee Court of Appeals, seeking review of the *Order Imposing Sanctions Against BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. § 65-4-120* issued on June 28, 2002 and signed by then Directors Greer and Malone. Chairman Kyle did not vote with the majority. The Order sanctioned BellSouth in the form of a penalty amounting to one thousand fifty dollars ($1,050.00) for failing to conform its conduct to the Tennessee Rules of Civil Procedure, the TRA Rules and the lawful orders of the agency.

Docket No. 01-00193: ***In Re Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.***

On February 21, 2001, the Authority convened the Performance Measurements Docket for the purpose of developing a common set of performance measurements, benchmarks and enforcement mechanisms to ensure that BellSouth provides nondiscriminatory access to its network elements as required by the Act. Concurrent with the establishment of this docket, the Authority adopted, as a base, the performance measurements, benchmarks and enforcement mechanisms ordered in TRA Docket No. 99-00430, *In re Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.*[16]

The Authority conducted a Hearing from August 20 through 23, 2001. Thereafter, a set of performance measurements, benchmarks and enforcement mechanisms was developed specifically for the regulation of telecommunications services in Tennessee. During deliberations at a regularly scheduled Authority Conference on April 16, 2002, the Directors unanimously voted to adopt these performance measurements, benchmarks and enforcement mechanisms.[17] On May 14, 2002, the Authority issued the *Order Setting Performance Measurements, Benchmarks and Enforcement Mechanisms.* This Order reflected the Directors' unanimous vote to adopt specific performance measurements, benchmarks and enforcement mechanisms to be implemented through interconnection agreements entered into between BellSouth and CLECs pursuant to 47 U.S.C. § 252.

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[16] *See In re Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 99-00430 (*Final Order of Arbitration*) (filed February 23, 2001).

[17] Chairman Kyle and Directors Greer and Malone made this decision. After their terms concluded on June 30, 2002, a three member voting panel consisting of Chairman Kyle and Directors Pat Miller and Ron Jones was randomly selected and assigned to the Performance Measurements Docket.

BellSouth filed its first *Motion for Reconsideration* in Docket No. 01-00193 on May 29, 2002. Therein, BellSouth argued, *inter alia,* that the Authority lacked jurisdiction to impose enforcement mechanisms and that the method used to adopt the performance measurements violated Tenn. Code Ann. § 8-44-101 *et seq.* (the "Open Meetings Act"). BellSouth also sought alterations in the implementation dates and other aspects of certain performance measurements adopted by the Authority, including the level of disaggregation and the value of delta (δ) in the truncated Z statistical method.[18] In concluding its Motion, BellSouth urged the Authority to reject the entire Tennessee plan, and adopt the performance measurements, benchmarks and enforcement mechanisms adopted by the Georgia Public Service Commission. On June 6, 2002, the CLEC Coalition filed its *Response to BellSouth's Motion for Reconsideration.*

During a specially scheduled Authority Conference held on June 18, 2002, the Authority deliberated BellSouth's first *Motion for Reconsideration.* The Directors unanimously rejected BellSouth's contentions that the Authority lacked jurisdiction to impose enforcement mechanisms and that the Authority violated the Open Meetings Act.[19]

A majority of the Directors granted certain BellSouth requests for modifications of the *Order Setting Performance Measurements, Benchmarks and Enforcement Mechanisms* and

[18] The Truncated Z methodology is a statistical approach to assess performance. The results produced by the methodology are themselves statistical measures. The parameter δ, delta, central to the Truncated Z methodology, is used to determine whether differences in service received by ILEC retail customers relative to CLECs is material, *i.e.*, services are provided at parity. The choice of δ, delta, defines the range of outcomes. For example, if BellSouth provides lower service levels to CLECs it may be judged to be a statistical variation rather than a failure to provide parity. Lower values of δ, delta, require BellSouth to more closely approximate or exceed the level of performance it provides to itself in order to be found to provide parity service to CLECs. Larger values for δ, delta, allow BellSouth greater leeway to provide service at a lower level to the CLECs than itself, while statistically still providing parity service under the Truncated Z methodology. Although a measurement may indicate that BellSouth provided service to a CLEC at a level lower than the quality it provided to itself, this measurement may not imply that BellSouth is not providing service at parity.

[19] *See* Transcript of June 18, 2002 Authority Conference, pp. 30-34.

denied others.[20] On June 28, 2002 the Authority issued its *Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms* reflecting the decision to grant the first *Motion for Reconsideration* and the various rulings on the substantive issues raised therein (attached hereto as Exhibit D). On July 12, 2002, BellSouth filed a second *Motion for Reconsideration,* seeking review of the *Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms* issued on June 28, 2002. In this Motion, BellSouth reiterated its request that the Authority reject the performance measurements, benchmarks and enforcement mechanisms presently in place in Tennessee and adopt Georgia's performance measurements, benchmarks and self effectuating enforcement mechanisms ("SEEMs") in Tennessee.

On July 23, 2002, a majority of the newly composed panel voted to grant BellSouth's second *Motion for Reconsideration* as part of the two-step process established by Tenn. Comp. R. & Reg. 1220-1-2-.20, which contemplates deliberations on the merits of the Motion at a later

[20] Chairman Kyle did not vote with the majority. Instead, the Chairman moved to implement BellSouth's Georgia performance measurements, benchmarks and self-effectuating enforcement mechanisms ("SEEMs") in Tennessee on an interim basis for six (6) months, reasoning as follows:

> I do believe that performance measures is a move towards 271. I am ready to take those necessary steps to enact the goal of the general assembly. The FCC has since approved Georgia's 271 application which includes performance measure plans that meet the requirements for ensuring nondiscriminatory access. Such plans can be reviewed when necessary. The FCC has worked hard, and I believe we should take judicial notice of their work, and I also believe that time, money, and efforts by the staff will be reserved for more efficient use and ultimately benefiting the consumer. Therefore, my position and motion is to adopt the Georgia performance plan. We can monitor such plans to see the effect, and should we need to modify or reinstate the Tennessee plan, we can. If the plan is working, we will have benefited all people concerned, especially consumers, and not have created unnecessary measures and will have lost nothing. That is my position for the record.

See Transcript of June 18, 2002 Authority Conference, pp. 34-50. The Motion failed for lack of a second.

date.[21] The majority reasoned that the Motion was replete with issues presented in an evidentiary record developed by the previous directors and additional time was needed for a careful review of the record.

Relevant Procedural History in TRA Docket No. 97-00309 (the 271 Docket)

On March 4, 1997, at a regularly scheduled Authority Conference, the Authority opened TRA Docket No. 97-00309, *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996* (the 271 Docket) on its own motion, to commence a formal inquiry relating to BellSouth's compliance with the requirements for entry into the in-region, long distance (interLATA) markets in Tennessee.[22] At the same Authority Conference, the Directors appointed then Director Melvin Malone to serve as Hearing Officer for the purpose of presiding over any pre-

[21] Chairman Kyle did not vote with the majority. Instead, she moved to implement BellSouth's Georgia SEEM plan in Tennessee, stating in pertinent part:

> I recognize the FCC has spoken. The FCC decides ultimately whether local markets are open and how to ensure they stay open. The FCC has expressly found that the Georgia plan is appropriate. As the FCC stated, "We find that the existing service performance measurement and enforcement mechanisms currently in place for Georgia and Louisiana provide assurance that these local markets will remain open after BellSouth receives Section 271 authorization." Now, the Georgia plan serves as a template for the entire region. It can be implemented in Tennessee quickly. Therefore, the Authority -- I move the Authority adopt the Georgia performance measurement and enforcement plan approved by the FCC. I feel Tennessee consumers deserve no less. That will be my motion for this docket item.

The motion failed for lack of a second. *See* Transcript of July 23, 2002 Authority Conference, pp. 29-32.

[22] *See In re BellSouth Telecommunications, Inc.'s Entry into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996,* TRA Docket No. 97-00309 (*Order Instituting Formal Inquiry and Adopting Procedure*) (issued March 21, 1997) (An Informal Investigation and Report provided by the TRA Staff, which was requested by the Directors on December 16, 1996 and issued on February 13, 1997, provided impetus to the decision to open this docket. The *Order Instituting Formal Inquiry and Adopting Procedure* deemed those entities that filed comments to the Staff Investigation and Report parties to this proceeding.). The parties participating in this proceeding include BellSouth, Birch Telecom of the South, Inc. ("Birch") and Ernest Communications, Inc. ("Ernest"), the Southeastern Communications Carriers Association ("SECCA"), AT&T Communications of the South Central States ("AT&T"), TCG MidSouth, Inc. ("TCG"), MCI WorldCom Communications, Inc., MCIMetro Access Services, Inc. and Brooks Fiber Communications of Tennessee, Inc. (collectively "WorldCom"), XO Tennessee, Inc. ("XO"), Time Warner Telecom of the MidSouth, LP ("Time Warner"), New South Communications Corp. ("New South"), Intermedia Communications, Inc. ("Intermedia"), DIECA d/b/a Covad Communications Co. ("Covad"), ICG Telecom Group ("ICG"), ITC DeltaCom, Inc., KMC Telecom III, Inc. and KMC Telecom IV, Inc. (collectively "KMC"), Sprint Communications Company, LP.

hearing or status conferences, resolving discovery disputes and such other matters as might aid in preparing the action for a Hearing.

On April 3, 1997, an initial Status Conference was held for the purposes of defining the specific factual, legal and policy issues to be considered in this docket and determining the extent and means of obtaining additional information within a procedural framework for this Inquiry. The *Report and Recommendation* issued by the Hearing Officer on April 18, 1997 reflected that BellSouth voluntarily agreed to provide the Authority with advance notice of at least ninety (90) days before filing its section 271 application with the FCC.[23]

BellSouth's First Section 271 Filing

On December 12, 1997, BellSouth filed its Notice of Filing, together with supporting documentation and testimony, with the Authority. BellSouth filed its SGAT on January 16, 1998. Thereafter, several Pre-Hearing Conferences and technical workshops were held by the Authority. Following a discovery period, and the submission of pre-filed testimony, a Hearing on the merits was held on May 5-7, May 11-15 and May 27-28, 1998.

BellSouth submitted a Notice of Supplemental Filing on July 22, 1998 to which the parties raised numerous objections. On November 19, 1998, a Status Conference was held to ascertain the status of several issues, including the late-filed exhibits to the Hearing. The parties reached a verbal agreement on December 15, 1998, permitting BellSouth to supplement its filing.

On March 10, 1999, the Authority issued a Final Conference Agenda providing notice to the parties that the Directors would be deliberating this case on its merits at the regularly scheduled Authority Conference on March 16, 1999. On March 10, 1999, BellSouth filed a

[23] *See In re BellSouth Telecommunications, Inc.'s Entry into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996,* TRA Docket No. 97-00309 (*Report and Recommendation*) (issued April 18, 1997) p. 6 (The Directors unanimously adopted and approved the *Report and Recommendation* at the April 29, 1997 Authority Conference).

Motion to remove this matter from the March 16, 1999 Authority Conference agenda. Various parties filed responses to BellSouth's Motion and the Motion was deliberated at the March 16, 1999 Authority Conference. After careful consideration, a majority of the Directors voted to deny BellSouth's Motion and declined to postpone the Hearing.[24] The Directors also directed Chairman Melvin Malone to act as Hearing Officer for the purpose of rendering a decision on the merits or taking such action as deemed appropriate.[25]

On April 8, 1999, BellSouth filed a *Notice of Voluntary Dismissal without Prejudice and Withdrawal of Advance Notice of Section 271 Filing* (hereinafter "Withdrawal"). BellSouth asserted that it had determined that rather than prepare another supplemental filing, it would withdraw its pending matters and renew its filing at the appropriate time.

On June 1, 1999, the Hearing Officer issued the *Initial Order Accepting BellSouth Telecommunication, Inc.'s Notice of Dismissal and Withdrawal.* At the June 8, 1999, Authority Conference, the Directors voted unanimously to accept BellSouth's Withdrawal.

BellSouth's Second Section 271 Filing

On May 30, 2001, BellSouth filed a *Preliminary Notice of Filing and Request for Scheduling Conference.* Therein, BellSouth stated its intention to file in late July 2001 a second section 271 application with the FCC seeking to gain authority to enter the interLATA long distance market in Tennessee. BellSouth also requested that the Authority convene a scheduling conference to facilitate the Authority's performance of its consultative role under 47 U.S.C. § 271. A Status Conference was held on July 12, 2001, after which the parties filed pre-filed testimony.

[24] *See id. (Order Denying BellSouth Telecommunications, Inc. March 10, 1999 Motion to Defer*) (issued April 14, 1999) p. 10.
[25] *See id.*

On July 30, 2001, BellSouth filed with the Authority the section 271 application that it represented it would file with the FCC. On August 6, 2001, the Hearing Officer issued a discovery schedule.

On August 10, 2001, the Hearing Officer issued the *Initial Order of the Hearing Officer on July 12, 2001 Status Conference*, in which he outlined the procedural framework for this matter, bifurcated the hearing into phases and set a Phase I hearing date for October 3-5 and 8-9, 2001. Dates in November were reserved for further hearings on the merits. The Hearing Officer also notified the parties that issues related to 47 U.S.C. § 272 and the public interest aspects of BellSouth's section 271 application would be considered at the Hearing set for October 3, 2001.

On August 27, 2001, BellSouth filed a *Petition for Clarification and Reconsideration of Initial Order of the Hearing Officer on July 12, 2001 Status Conference*, arguing that the TRA's consideration of issues related to 47 U.S.C. § 272 and the public interest was unnecessary and inappropriate. BellSouth also asserted that consideration of BellSouth's compliance with the competitive checklist in 47 U.S.C. § 271 was not dependent upon the completion of the Performance Measurement Docket, TRA Docket No. 01-00193. BellSouth stated that it did not intend to use Tennessee-specific data to support its section 271 application because its Georgia-approved service quality measurements ("SQMs") were sufficient to support its application for Tennessee.

On September 10, 2001, the Hearing Officer issued the *Initial Order of Hearing Officer on Petition for Clarification and Reconsideration of Initial Order of the Hearing Officer on July 12, 2001 Status Conference and Restatement of BellSouth's Position.* The Hearing Officer rejected BellSouth's contention that the TRA should not consider issues related to 47 U.S.C. § 272 and the public interest. In addition, the Hearing Officer stated that it would be premature to preclude the adoption of Tennessee-specific performance measurements in this proceeding.

On September 17, 2001, the Hearing Officer issued the *Initial Order Resolving Discovery Disputes and Suspending Procedural Schedule,* which suspended the procedural schedule pending the completion of discovery. On September 18, 2001, BellSouth filed a *Motion to Amend Procedural Order* seeking to postpone the deliberations on the section 272 and public interest issues[26] and requesting the Authority to jointly consider the issues related to 47 U.S.C. §§ 271 and 272 and the public interest issues.[27]

On December 10, 2001, the Hearing Officer issued the *Initial Order Resolving Remaining Discovery Disputes.* Discovery continued through December 2001.

On January 28, 2002, BellSouth filed a *Petition to Establish Procedural Schedule.* BellSouth renewed its request that all the issues in this proceeding, including those arising under 47 U.S.C. §§ 271 and 272 and the public interest issue, be heard in a single hearing. BellSouth also sought permission to file additional evidence and proposed that the matter be heard in mid-April of 2002.

On February 4, 2002, SECCA, AT&T and TCG filed their *Response to BellSouth's Petition to Establish Procedural Schedule,* opposing BellSouth's request to submit additional evidence and requesting that the Authority strike BellSouth's entire section 271 filing. SECCA, AT&T and TCG argued that BellSouth could no longer represent to the Authority in good faith that its application was current, in light of the facts that (1) BellSouth had withdrawn the section 271 application it had filed with the FCC for Georgia and Louisiana in lieu of having the FCC reject that application and (2) the Georgia and Louisiana application was essentially identical to the application BellSouth intended to file for Tennessee.

[26] BellSouth requested that the Authority postpone the hearing on these matters until at least January 1, 2002.
[27] As noted previously, the TRA had opened a separate docket, TRA Docket No. 01-00362, on February 21, 2001 to consider whether BellSouth provided nondiscriminatory access to its OSS. *See* 47 U.S.C. § 271(c)(2)(B)(ii).

On March 1, 2002, the *Initial Order of the Hearing Officer on BellSouth Telecommunications, Inc. Petition to Establish Procedural Schedule* was issued. Therein, the Hearing Officer granted BellSouth's request that all the issues raised by its section 271 application be considered in a single Hearing. Further, the Hearing Officer reminded BellSouth of its representation that it had filed " a complete and compliant section 271 application" on July 30, 2001 and informed BellSouth that it would be held to that representation.[28] The Hearing Officer observed that BellSouth's withdrawal of its section 271 application for Georgia and Louisiana from consideration by the FCC considerably weakened its contention that its section 271 filing in Tennessee was current. In order to promote the interests of judicial economy and preclude the potential for staleness in the section 271 filing, the Hearing Officer ordered BellSouth to re-file its section 271 filing with the TRA or, alternatively, submit by March 15, 2002, a detailed, substantive affidavit, executed by BellSouth's president, affirmatively asserting that the July 30, 2001 filing with the TRA remained compliant with section 271 in all respects, consistent with the TRA's section 271 requirements and constituted in all respects the section 271 application BellSouth will file with the FCC.

BellSouth's Third Section 271 Filing

On April 26, 2002 BellSouth submitted its third section 271 filing to the Authority in this docket.[29] On May 8, 2002, the Hearing Officer issued a Notice establishing a procedural schedule and the parties proceeded with discovery pursuant to that Notice. On May 23, 2002, the Hearing Officer issued a Notice directing the parties to reserve August 5-9, 2002 for the Hearing on the merits in this docket.

[28] *Initial Order of the Hearing Officer on BellSouth Telecommunications, Inc. Petition to Establish Procedural Schedule* (issued March 1, 2002) p. 7.
[29] BellSouth did not seek permission to withdraw its second application, even after filing its third application.

On June 25, 2002, BellSouth notified the Authority that the parties had agreed that the CLECs that are parties to this docket would not submit evidence contesting BellSouth's compliance with section 271 Checklist Items 3, 7, 9 and 12 or 47 U.S.C. § 272. On June 28, 2002, BellSouth and KMC filed their respective lists of proposed issues. AT&T, TCG and WorldCom jointly filed a list of proposed issues. The parties filed pre-filed testimony on July 12 and rebuttal testimony on July 22.

On June 30, 2002, the terms of Chairman Sara Kyle, and Directors H. Lynn Greer, Jr. and Melvin J. Malone expired. Chairman Kyle was reappointed and commenced a new term as a Director of the Authority on July 1, 2002. Deborah Taylor Tate, Pat Miller and Ron Jones were appointed as new Directors of the TRA and commenced their terms on July 1, 2002. Subsequently, a three member voting panel consisting of Chairman Kyle and Directors Tate and Miller was randomly selected and assigned to TRA Docket No. 97-00309 (the 271 Docket). At a regularly scheduled Authority Conference held on July 23, 2002, the panel voted unanimously to appoint Director Tate to serve as Pre-Hearing Officer to prepare the docket for a hearing. A Pre-Hearing Conference was held on July 30, 2002. At the suggestion of the Pre-Hearing Officer, the parties initiated settlement negotiations regarding the remaining contested issues. On July 30, 2002, the Pre-Hearing Officer issued a Notice informing the parties that the Hearing on the merits would commence on August 6, 2002. Immediately prior to the commencement of the Hearing, a Pre-Hearing Conference was convened for the parties to report on the status of the settlement negotiations. At that time, the parties informed the Pre-Hearing Officer that the settlement negotiations were progressing and requested additional time to continue with the negotiations. On August 7, 2002, the parties informed the Pre-Hearing Officer that they had

reached a settlement agreement that would resolve matters of proof relating to the outstanding issues in this docket.[30]

Immediately following the Pre-Hearing Conference on August 7, 2002, the panel in the 271 Docket convened the final Hearing. Thereafter, Pre-Hearing Officer Tate informed the panel assigned to this docket that the parties had reached a proposed Settlement Agreement (attached to Exhibit E). The parties then presented to the panel a summary of the Settlement Agreement and an explanation regarding how it affected this docket and two other dockets: Docket No. 01-00362[31] (the OSS Docket) and Docket No 01-00193 (the Performance Measurements Docket).[32] The parties also informed the panel that a number of the parties in this docket, Docket No. 97-00309, had agreed to the Settlement Agreement, and those parties that did not join in the Settlement Agreement had either withdrawn from the proceedings or concurred in the parties' agreement to submit the case to the panel for a decision based on the current record without conducting the previously scheduled evidentiary Hearing.

BellSouth summarized the Settlement Agreement as follows: With regard to Docket No. 97-00309 (the 271 Docket), the parties proposed that the record should be closed as of July 31, 2002 and the case be submitted to the Directors for deliberations based on that record. The parties agreed that no additional testimony, argument, briefs or opposition would be filed in the docket. The parties requested that the panel publicly deliberate Docket No. 97-00309 (the 271 Docket) on August 26, 2002.

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[30] The following parties were involved in the settlement negotiations: BellSouth, Birch, Ernest, ITC DeltaCom, Inc., MCI WorldCom Communications, Inc., and its subsidiaries, MCImetro Access Services, Inc. and Brooks Fiber Communications of Tennessee, Inc., Covad, Time Warner, XO, Intermedia, SECCA, ICG, US LEC of Tennessee, Inc. and American Communications Services, Inc. AT&T and KMC.

[31] *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations,* Docket No. 01-00362.

[32] *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.,* Docket No. 01-00193.

As to Docket No. 01-00362, (the OSS Docket) the parties agreed that they would ask the TRA to administratively close the docket. In addition, the parties proposed that the closing of the docket would not prevent any party from filing a complaint with the TRA regarding BellSouth's OSS in the future. The parties requested that expedited treatment be given to OSS complaints. The parties agreed, however, that no such complaints would be filed prior to the entry of an order by the TRA reflecting the TRA's decision in Docket No. 97-00309 (the 271 Docket).

With regard to Docket No. 01-00193, (the Performance Measurements Docket) the parties requested that the Authority adopt, as the Tennessee Performance Assurance Plan, the SQMs and SEEMs adopted by the Florida Public Service Commission on February 14, 2002, as they presently exist and may be modified in the future and implemented no later than December 1, 2002. The parties agreed not to seek amendments to the plan until December 1, 2003, after which the TRA at its discretion may conduct a review of the plan and the parties are free to recommend modifications. The parties agreed that in the interim, prior to December 1, 2002, BellSouth would implement the Georgia Performance Plan and self-effectuating enforcement mechanisms. The parties also proposed that the TRA adopt the Tennessee performance measurements for special access that were included as Attachment B to the *Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms* issued on June 28, 2002 (attached hereto as Exhibit D). The parties agreed that should the FCC implements national standards, no party would be estopped from requesting that the TRA adopt the FCC standards.[33]

The parties also agreed that the CLECs that are parties to Docket No. 97-00309 (the 271 Docket) may request, via the filing of a complaint, that the TRA open a generic contested

[33] Attachment B is an attachment to Exhibit D herein.

proceeding to address BellSouth's obligations, if any, to offer DSL service to CLEC voice customers and related OSS issues.[34] The parties agreed that BellSouth could raise any and all defenses to the CLECs' complaints. BellSouth agreed not to oppose expedited treatment of such complaints.

Finally, the parties agreed not to comment in the FCC proceeding regarding the TRA decision to utilize a paper hearing and not to raise this as a criticism of the TRA's recommendation to the FCC regarding BellSouth's § 271 application.

After BellSouth finished presenting this summary of the Settlement Agreement, BellSouth, Birch, Ernest, ITC DeltaCom, Inc., MCI WorldCom Communications, Inc., and its subsidiaries, MCImetro Access Services, Inc. and Brooks Fiber Communications of Tennessee, Inc., Covad and Time Warner orally agreed on the record to the terms of the Settlement Agreement. The Office of the Tennessee Attorney General and Reporter, Consumer Advocate and Protection Division stated that while said Division was not a signatory, it is supportive of the Settlement Agreement. On the signature pages of the Settlement Agreement, XO, Intermedia, SECCA, ICG, US LEC of Tennessee, Inc. and American Communications Services, Inc. indicated that they had withdrawn from this proceeding. AT&T and KMC signed a separate document stating that they were not parties to the Settlement Agreement, but agreed that this matter be submitted to the Authority on the current record without further submissions or hearings.

After considering the parties' statements, the panel in Docket No. 97-00309 (the 271 Docket) unanimously voted to approve the Settlement Agreement on the condition that the panels in Docket No. 01-00362 (the OSS Docket) and Docket No. 01-00193 (the Performance

[34] DSL is an acronym for digital subscriber line, a developing technology that uses ordinary copper telephone lines to deliver high-speed information, including audio, video and text.

Measurements Docket) accepted and approved those portions of the Settlement Agreement affecting those respective dockets. Shortly thereafter, the regularly scheduled Authority Conference that was continued from August 5 to August 7, 2002 reconvened and the panels in Docket No. 01-00193 and Docket No. 01-00362 both unanimously voted to accept the Settlement Agreement.

The panel in Docket No. 97-00309 (the 271 Docket) then reconvened. After ascertaining that the respective panels in Docket No. 01-00193 and Docket No. 01-00362 had unanimously voted to accept the Settlement Agreement, the panel in Docket No. 97-00309 (the 271 Docket) unanimously voted to accept the Settlement Agreement and to reconvene on August 26, 2002 to deliberate the merits of the issues raised in this docket. The *Order Approving Settlement Agreement* in Docket No. 97-00309 (the 271 Docket) memorializing these decisions was issued on August 29, 2002 (attached hereto as Exhibit E).

The August 26, 2002 Authority Conference

During a specially scheduled Authority Conference on August 26, 2002, the Authority deliberated the merits of the issues raised in the 271 docket. In its deliberations, the Authority relied upon (1) the record in this docket as of July 31, 2002, as required by the Settlement Agreement filed in this docket on August 8th, 2002 (the "Settlement Agreement"); (2) the Settlement Agreement itself; (3) the FCC's statements in its Georgia/Louisiana Order; and (4) the comments of the Department of Justice with regard to the 271 application filed by BellSouth with regard to Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.

A. Track A Requirements

The Authority voted unanimously that BellSouth satisfies the Track A requirements contained in section 271(c)(1)(A) of the Act.

Approval of BellSouth's 271 application under Track A requires the existence of one or more binding agreements between BellSouth and a facilities-based competitor that have been approved under section 252 of the Act. The Authority found that the record shows that BellSouth has, through negotiations and/or arbitration, effected numerous interconnection agreements with CLECs in Tennessee. In fact, the Authority has approved approximately three hundred and twenty-four (324) such agreements between BellSouth and various CLECs. The parties have not disputed nor produced evidence refuting the fact that some of these CLECs provide facilities-based service.

During deliberations, the Authority gave little weight to the intervenors' argument that BellSouth's status as the dominant local service provider precludes approval of its 271 application. After noting that the Track A statutory language is entirely silent on the matter of market share or the power of the ILECs, the Authority found that the market share arguments advanced by the CLECs, particularly SECCA, have little, if any, relevance to the determination of whether BellSouth has satisfied the requirements of Track A. The Authority noted that its approach to the market share argument was consistent with the FCC's Georgia/Louisiana Order, which stated that "[e]ven if BellSouth's methodology inflates the total number of lines as the CLECs suggest, we still find there is an actual commercial alternative based on the sufficient number of voice customers served over competing LECs' own facilities."[35] In rejecting the contention that market share should be the sole test for entry into long distance, the Authority also referenced the FCC's statements in the Georgia/Louisiana Order indicating that BellSouth was not required to show that competitors had captured a particular market share and that

[35] *In the Matter of BellSouth Corporation, Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana,* CC Docket No. 02-35 (Memorandum Opinion and Order) (released May 15, 2002) 2002 WL 992213, 17 FCC Rcd. 9018, ¶ 13.

Congress had declined to adopt a market share or other similar test for BOC entry into long distance.[36]

B. Statement of Generally Available Terms

Director Tate addressed BellSouth's request that the Authority find that its Statement of Generally Available Terms ("SGAT") is consistent with 47 U.S.C. § 251 and contains cost-based rates for network elements consistent with 47 U.S.C. § 252(d). Director Tate observed that the CLEC intervenors did not specifically address BellSouth's SGAT filing.

Director Tate explained that the SGAT functions as an interconnection agreement that a carrier can accept without the need for separate negotiation. She noted that 47 U.S.C. § 252(f)(2) instructs state regulators to deny an SGAT unless such agreement is consistent with the regulations promulgated by the FCC under 47 U.S.C. § 251 and the cost-based pricing standards for network elements set forth in 47 U.S.C. § 252(d).

Director Tate stated that, based upon the recent changes stemming from the Settlement Agreement in this docket and the resultant adoption of the Florida performance plan in the Performance Measurements Docket, the SGAT as currently filed requires substantial revision before the agency can review, much less approve, the SGAT. Director Tate observed that deferring action on BellSouth's SGAT does not impair its ability to receive section 271 relief in that BellSouth filed a Track A 271 application, and a legally binding SGAT is not necessary to receive FCC approval under Track A.

Director Tate then stated that she intended to ask the panel in Docket No. 01-00526 to

[36] *See id.* at ¶ 14 (quoting *Sprint Communications Co., L.P. v. FCC,* 274 F.3d 549, 553-54 (D.C. Cir. 2001)). Nevertheless, the Authority acknowledged that BellSouth's estimates of CLEC penetration in Tennessee and the number of CLECs providing service appeared to be somewhat exaggerated. Information collected by the TRA as of May 31, 2002, revealed that thirty-seven (37) CLECs, serving approximately 396,000 access lines, excluding resale lines, were offering facilities-based or UNE-based local service in the state. The TRA's investigation also showed that, as of May 31st, BellSouth had approximately ninety-three (93) active facilities-based CLEC interconnection agreements in place in Tennessee.

review the SGAT because the common goal of both Docket 01-00526 and the SGAT was to establish terms and conditions that comply with the Act.[37]

Chairman Kyle then made a motion to approve SGAT under section 252(f) based on the findings that BellSouth's SGAT satisfies the requirements of 47 U.S.C. §§ 251 and 252(d). Changes reflecting the Settlement Agreement shall subsequently be incorporated into the SGAT. Director Miller seconded the motion.[38], [39]

C. Section 271(c)(2)(B): The Fourteen Point Checklist

The Authority then turned to the issue of BellSouth's compliance with 47 U.S.C. § 271(c)(2)(B) and the 14-point checklist contained therein.

Checklist Item 1: Interconnection in accordance with the requirements of 47 U.S.C. §§ 251(c)(2) and 252(d)(1)

The Authority unanimously voted that BellSouth complies with Checklist Item 1. In its deliberations, the Authority considered the FCC's practice of examining performance with respect to provision of interconnection trunks and collocation. The Authority recognized that, at the present time, according to the TRA's records, there are presently approximately one hundred and five (105) active interconnection agreements between BellSouth and various CLECs in Tennessee. The Authority further noted that the data provided by BellSouth in this proceeding, which is comparable to the data BellSouth provided to the FCC in the Georgia and Louisiana proceeding, shows adequate performance. The Authority further found that the record demonstrates that BellSouth provides various methods to allow CLECs to interconnect.

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[37] On June 21, 2001, the Authority convened the *Generic Docket to Establish Generally Available Terms and Conditions for Interconnection* (Docket No. 01-00526) for the purpose of resolving frequently arbitrated issues and producing generally available terms and conditions for interconnection.
[38] Director Tate did not vote with the majority.
[39] The Authority will issue an order reflecting the majority's decision to approve the SGAT.

Checklist Item 2: Nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1)

The Authority unanimously voted that BellSouth is providing or generally offering nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) and, therefore, is in compliance with Checklist Item 2.

During deliberations, the Authority observed that the Settlement Agreement affected its consideration of the issues raised in Checklist Item 2. Specifically, the Authority recounted that the Settlement Agreement requested (1) the closing of the record in the 271 Docket as of July 31, 2002; (2) the administrative closing of the OSS Docket, Docket No. 01-00362 (although such closing would not prevent the parties from filing future complaints with the Authority regarding access to BellSouth's OSS); (3) the use of the Georgia performance plan as the interim performance plan for section 271 purposes and the adoption of the Florida performance plan, with the addition of the Tennessee Special Access measures, as the permanent plan as of December 1, 2002; and (4) the Authority's consent, upon request by the CLECs, to open a generic contested case proceeding to address expeditiously the issue of BellSouth's provision of DSL service to CLEC voice customers and related OSS issues. The Authority observed that the majority of the intervenors either withdrew their opposition to BellSouth's section 271 application, withdrew from these proceedings or agreed that this matter be submitted to the Authority on the current record without further submissions or hearings.

The Authority then addressed the performance measures submitted as part of the testimony of BellSouth witness Mr. Alphonso Varner, BellSouth's Assistant Vice President of Interconnection Services. The Authority observed that the CLECs' contention that these measures are inappropriate is moot under the Settlement Agreement, because the parties thereto had agreed that the Georgia SQMs would be implemented temporarily for purposes of determining 271 compliance. The Authority also noted that the Georgia SQMs were the subject

of three audits and were deemed to be appropriate by the FCC with regard to other BellSouth state applications.

The Authority commented that although the preordering benchmarks in the November and December, 2001 and January, 2002 SQMs (submitted as an attachment to Alphonso J. Varner's testimony) were not achieved every month, the failures were not sufficiently consequential to reveal a systematic failure by BellSouth. The Authority therefore concluded that BellSouth satisfactorily achieved the benchmarks established to measure preordering performance.

The Authority then observed that BellSouth either met or exceeded the benchmarks established under the Georgia SQMs in November and December of 2001 and January of 2002 regarding a majority of the ordering metrics. While recognizing that BellSouth failed to consistently meet the benchmark for flow-through, the Authority stated that, under the methodology used in the Georgia/Louisiana Order, meeting the benchmark for flow-through was not required for section 271 approval, provided BellSouth processes manual orders in a compliant manner. The Authority observed that BellSouth had satisfied the benchmark for Firm Order Commitments ("FOC") and for Reject Interval for Partially Mechanized and Manual Orders on the majority of the submetrics. The Authority commented that although some submetrics did not achieve the benchmark, the unsuccessful submetrics had significantly lower volumes than the successful submetrics and, therefore, only minimally impacted the measurement as a whole. The Authority stated that BellSouth is compliant on the majority of the items reported.

The Authority acknowledged the CLECs' contention that the results of the FOC and Reject Response Completeness Multiple Responses metric demonstrated that BellSouth had

engaged in "serial clarification."[40] The Authority then observed that the CLECs failed to submit any evidence supporting their contention, which left undisputed BellSouth's assertion that there are legitimate reasons for the multiple responses deemed to be "serial clarification" by the CLECs.

The Authority then commented that, upon review of the SQMs for provisioning, The evidence supported a finding that BellSouth's performance was at parity with retail, meaning that BellSouth had provided service to its CLEC customers equivalent to the service it provides to its retail customers. The Authority observed that the record indicates that in the instances where BellSouth's service was inferior to that which it provides to itself, the volumes were too low to warrant a determination of noncompliance. The Authority stated that although the performance reported for Service Order Accuracy for November, 2001 through January, 2002 failed to meet the Georgia benchmark for all the submetrics, this failure was not sufficient to warrant a finding that BellSouth was noncompliant with regard to Checklist Item 2 in its entirety. The Authority advised that it would continue to closely monitor BellSouth's performance with regard to both Service Accuracy and Percent Provisioning Troubles Within 30 Days.

Upon review of the SQMs for maintenance and repair, the Authority observed that BellSouth either meets or exceeds the benchmark on most of the measures. The Authority stated that the measures in which BellSouth's performance is less than the benchmark have a minimal impact on the CLECs' ability to compete because the volumes are significantly lower than the successful submetrics.

[40] Serial clarification is a term that CLECs have used to describe BellSouth's alleged procedure of providing an incomplete response to an Observation or Exception noted by a third party tester, which then requires further inquiry and prevents the expeditious resolution of the matter. CLECs view this procedure as a form of obfuscation, the object of which is to confuse rather than enlighten.

The Authority then examined the remaining measures in the SQM: billing, collocation, and change control. Observing that BellSouth is predominately compliant with all but two billing measures: Billing Accuracy and Usage Data Delivery Timeliness, the Authority commented that the Authority should continue to monitor BellSouth's performance in these areas. The Authority further stated that Billing Accuracy is a parity measure, and although BellSouth failed to meet the measure for the month of January, 2002, the discrepancy was less than 1 percent (1%).

Director Tate then addressed the issue of change control, stating that despite the acceptable performance results for change control, she shared the Department of Justice's concerns regarding this important process. After acknowledging BellSouth's argument that the CLECs are merely complaining about their inability to totally take charge of change control, Director Tate observed that the CLECs had raised legitimate concerns. Of particular concern were the CLECs' allegations of a backlog of changes that could take nine (9) months to fully implement and which may be mishandled by BellSouth due to its rush to deploy new versions of software before they have been adequately tested. Director Tate cautioned that while BellSouth's desire to expeditiously resolve these issues as it pursues section 271 approval is understandable, to do so at the expense of the CLECs' it is attempting to appease would be shortsighted. Director Tate posited that, in light of the regional nature of change control and the intense involvement of both the Georgia and Florida Commissions in developing policies on change control, it would be imprudent for Tennessee to arbitrarily step in at this juncture and begin to impose additional policies. For this reason, Director Tate instructed Staff to issue a data

request to obtain an updated change control issue list from BellSouth and a statement of the applicable status of the issues with all the other state commissions and the FCC.[41]

The Authority specifically addressed WorldCom's argument that BellSouth's cost-based UNE rates are excessive because they are predicated on out-of-date technology derived from data from 1995 to 1998, prior to many technological advances. On February 23, 2001, the Authority ordered permanent prices for collocation elements and UNE rates in the Permanent Prices Docket, after a contested case proceeding.[42] In light of the findings in that docket, the record in the instant docket and the absence of evidence demonstrating that BellSouth's rates are not based on TELRIC methodology, the Authority concluded that BellSouth provides UNEs at rates that are nondiscriminatory.

The Authority then commented that BellSouth's refusal to provide its Fast Access Digital Subscriber Line ("DSL") Service to customers that choose a CLEC as their voice provider has been the subject of heated debate, not only in this proceeding but also in BellSouth's other 271 applications to the FCC. The Authority observed that although the FCC found that BellSouth's Fast Access Service policy was compliant with FCC rules, other state commissions, notably Florida and Kentucky, have initiated proceedings related to Fast Access Service. The Authority commented that, pursuant to the Settlement Agreement, any concerns regarding the FCC's policy raised by the comparatively low rate of residential penetration in Tennessee could be explored in a separate docket in an expedited manner.

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[41] Director Tate also expressed her support for the establishment of a regional committee to address change control issues. She observed that such a committee, if established, could more efficiently provide guidance on a regional rather than a state-by-state basis which could result in savings in cost and manpower to both state commissions and the industry.

[42] See In re Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements, Docket No. 97-01262 (Final Order) (issued February 23, 2001).

The Authority commented that other issues brought forth by the CLECs, including AT&T's complaint about application of rates in its interconnection agreement and Ernest's complaint that BellSouth failed to assign FLEX ANI features to lines Ernest had ordered, are misplaced in this docket. The Authority found that these issues could be more appropriately handled as individual complaints.

Director Tate then addressed AT&T's complaint of existing problems in states other than Tennessee where customer outages have continued even after BellSouth implemented the single "C" order process for UNE-P conversions. According to BellSouth, the single "C" order process for UNE-P conversions was to be implemented in Tennessee by August of 2002. Director Tate acknowledged BellSouth's assertion that only 0.046 percent (.046%) of UNE-P conversions ordered through the single "C" order process were affected and BellSouth's assurance that the problem should have been alleviated. Director Tate commented that notwithstanding the small number of orders affected, the Authority should take an interest in this matter to prevent unnecessary outages in consumer services in the future. Director Tate then directed the Staff to issue a data request to require BellSouth to file an update on the single "C" order process as it has been implemented in Tennessee.

In order to facilitate the Authority's supervision and regulation of BellSouth's service under the Georgia SQMs, Director Tate directed Staff to issue a data request to BellSouth to obtain an itemized list of all enforcement mechanisms paid and their corresponding metrics in conjunction with any and all payments for both the interim and the permanent performance plan. Director Tate stated that the information supplied in BellSouth's response may be used by parties in pinpointing areas of needed attention as well as verification of payments made under the SEEMs.

Checklist Item 3: Nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by the Bell Operating Company at just and reasonable rates in accordance with the requirements of 47 U.S.C. § 224

The Authority unanimously voted that BellSouth is providing or generally offering nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell Operating Company at just and reasonable rates in accordance with the requirements of 47 U.S.C. § 224 and, therefore, is in compliance with Checklist Item 3. The parties stipulated to this section 271 checklist item.

In support of its decision, the Authority found that BellSouth has methods and procedures in place for offering access to BellSouth's poles, ducts, conduits, and rights-of-way that are set forth in its license agreement for rights-of-way, conduits, and pole attachments. The Authority also determined that (1) negotiating carriers and BellSouth have agreed to the terms of the license agreement in numerous instances; (2) BellSouth's license agreement places a time period for itself and new entrants to access poles, ducts, conduits, and rights-of-way; and (3) BellSouth has requested that entrants occupy the space within 12 months of the day the space is assigned.

Checklist Item 4: Local loop transmission from the central office to the customer's premises unbundled from local switching or other services

The Authority unanimously determined that BellSouth is providing or generally offering local loop transmission from the central office to the customer's premises unbundled from local switching or other services and, therefore, is in compliance with Checklist Item 4. During deliberations, the Authority examined whether BellSouth provides loop facilities from central offices to customer premises unbundled from local switching or other network elements. The Authority applied the standard for weighing the evidence on this issue used in the Georgia/Louisiana Order, finding that satisfactory performance data is sufficient to show nondiscriminatory access to unbundled loop facilities.

After reviewing the performance data submitted in support of Checklist Item 4, the Authority found that BellSouth's performance was satisfactory in Tennessee. According to the Authority, the record reveals no systemic problems associated with either BellSouth's provisioning or maintenance and repair activities associated with unbundled loops. The Authority found that BellSouth, with only limited exceptions, met parity as compared to a retail analog for the majority of reported performance metrics.

The Authority further found that the record does not support Covad's argument that BellSouth's installation of Digital Loop Carrier ("DLC") services is effectively re-monopolizing the local loop. The Authority commented that Covad has other options that would allow it to provide service to customers behind DLC remote terminals. The Authority also noted that Covad's failure to file a written complaint against BellSouth with the TRA undermines its assertion that BellSouth failed to provide line sharing within the time interval specified by its interconnection agreement.

Checklist Item 5: Local transport from the trunk side of a wire line local exchange carrier switch unbundled from switching or other services

The Authority unanimously found that BellSouth is providing or generally offering local transport from the trunk side of a wire line local exchange carrier switch unbundled from switching or other services and, therefore, is in compliance with the Checklist Item 5. In analyzing Checklist Item 5, the Authority referred to its prior finding in Docket No. 99-00377 that BellSouth's provisioning of enhanced extended loops ("EELs")[43] is consistent with the requirements of the Act and related federal rules and orders.[44] The Authority recounted that it

[43] *See Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 99-00377 (*Final Order of Arbitration*) (issued August 4, 2000) p. 5; EELs are unbundled local loops that are cross-connected to interoffice transport.

[44] *See In re Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. (*Final Order of Arbitration*) (issued August 4, 2000) pp. 2-7.

had determined that requiring BellSouth to provide EELs is appropriate from a public policy perspective in that it fostered competition in the telecommunications market by allowing competing carriers to serve areas without having to install their own switches, trunks, and loops, or without having to collocate in BellSouth owned and operated central offices.

The Authority then observed that the parties had not challenged BellSouth's evidence showing that BellSouth provides unbundled transport to competitive carriers in a nondiscriminatory manner and thus concluded that BellSouth had demonstrated the existence of a number of dedicated and common transport arrangements provided to competitive carriers.

Checklist Item 6: Local switching unbundled from transport, local loop transmission, or other services

The Authority unanimously found that BellSouth is providing or generally offering local switching, unbundled from transport, local loop transmission, or other services and, therefore, is in compliance with Checklist Item 6. In support of this finding, the Authority determined that the record herein shows that BellSouth provides: (1) line-side and trunk-side facilities; (2) basic switching functions; (3) vertical features; (4) customized routing; (5) shared trunk ports; (6) unbundled tandem switching; (7) usage information for billing exchange access; and (8) usage information for billing reciprocal compensation. The Authority found that BellSouth demonstrated that it provides a significant number of unbundled switch ports and loop port combination arrangements to competitive carriers. The Authority determined that this evidence is sufficient to satisfy Checklist Item 6.

The Authority acknowledged that both AT&T and Covad had raised billing issues related to this Checklist Item. AT&T argued that the daily usage filed and wholesale bills it receives from BellSouth have contained such errors as: (1) originating switching charges for calls originated on AT&T's own switch; (2) monthly billing for one-time collocation charges; (3) failing to bill for local minutes of use for a six-month period; (4) billing new accounts for past-

due balances; and (5) assessing late payment charges against AT&T when payment was not overdue. The Authority found that a substantial majority of AT&T's bills are correct and that BellSouth and AT&T have entered into a dispute resolution process to resolve the billing problems.

Covad contended that it is prematurely billed for Line Shared Loop orders. BellSouth reiterated its commitment to addressing Covad's problem and that the result of the premature billing is a minimal one-time overcharge that can be resolved by disputing the bill. The Authority found that the billing issues raised by the parties were not sufficiently material to warrant a finding of noncompliance with Checklist Item 6.

Checklist Item 7: Nondiscriminatory access to (1) 911 and E911 services; (2) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (3) operator call completion services

The Authority unanimously voted that BellSouth is providing or generally offering nondiscriminatory access to 911 and E911 services, directory assistance services to allow the other carriers' customers to obtain telephone numbers, and operator call completion services, and, therefore, is in compliance with Checklist Item 7. The parties stipulated to the fact that BellSouth satisfies the requisites of Checklist Item 7.

In support of its finding on this issue, the Authority observed that the record shows BellSouth affords competitors the ability to access 911 and E911 services and maintains the database entries for CLECs with the same accuracy and reliability that it maintains the database entries for its own customers. The Authority observed that BellSouth provides municipality listings to CLECs that enable the CLECs to translate 911 calls to the appropriate directory number and acknowledged BellSouth's statement that it will continue to load CLEC end-user information into the associated databases.

The Authority found that BellSouth provides CLECs with equivalent access to its directory assistance and operator services. BellSouth offers access to directory assistance databases either through access to the directory assistance database ("DADS") or through the directory access directory assistance services ("DADAS"). In addition, the Authority found that CLECs have the option of using BellSouth's directory assistance and operator services through customized routing or providing their own operator and directory assistance services. The Authority noted that when the CLEC customers use directory assistance and operator services of BellSouth, the CLECs may request that BellSouth brand the call.

Checklist Item 8: White pages directory listings for customers of other telecommunications carriers' telephone exchange service

The Authority unanimously found that BellSouth is providing or generally offering white pages directory listings for customers of the other carriers' telephone exchange services and, therefore, is in compliance with Checklist Item 8. In considering this issue, the Authority acknowledged that some CLECs had presented anecdotal evidence of noncompliance with Checklist Item 8 in the context of BellSouth's five-state section 271 application to the FCC.[45] The Authority also noted that although KMC had presented evidence that BellSouth is not complying with Checklist Item 8 in the proceedings on BellSouth's Georgia and Louisiana application, the FCC had not found KMC's argument sufficiently compelling to support a finding that BellSouth was not in compliance. The Authority concluded that in the instant proceeding, the CLECs presented no evidence that BellSouth does not comply with Checklist Item 8.

[45] The states included in the five-state application are Kentucky, North Carolina, South Carolina, Mississippi and Alabama.

Checklist Item 9: Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to other carriers' telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules

The Authority unanimously found that BellSouth is providing or generally offering nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers and, therefore, is in compliance with Checklist Item 9. The parties stipulated that BellSouth meets the requirements of sections 271(c)(2)(B)(ix) and 251(b)(3) of the Act and, therefore, satisfies the requisites of Checklist Item 9.

During the deliberations on this issue, the Authority observed that Lockheed Martin assumed the responsibility of acting as the North American Numbering Plan Administrator ("NANPA") in 1998 and, in BellSouth's region, the transition began July 6, 1998 and concluded August 14, 1998. The Authority also noted that BellSouth no longer performs the central office code assignment function; inasmuch as NeuStar assumed all NANPA responsibilities on November 17, 1999 when the FCC approved the transfer of Lockheed Martin's Communications Industry Service Division to NeuStar, Inc. The Authority concluded that BellSouth had demonstrated that it assists CLECs in obtaining NPA/NXX codes, adheres to industry guidelines as well as FCC rules and continues to demonstrate accurate reporting of data to the central office code administrator.

Checklist Item 10: Nondiscriminatory access to databases and associated signaling necessary for call routing and completion

The Authority unanimously found that BellSouth provides nondiscriminatory access to databases and associated signaling necessary for call routing in Tennessee and, therefore, has complied with the requirements of Checklist Item 10. During deliberations, the Authority observed that the parties did not contest BellSouth's claim that it is in compliance with Checklist Item 10. The Authority then commented that the information filed in this docket is comparable

to the data used by the FCC to find that BellSouth was in compliance with Checklist Item 10 in the Georgia/Louisiana Order.

Checklist Item 11: Until the date by which the commission issues regulations pursuant to 47 U.S.C. § 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

The Authority unanimously found that BellSouth is providing or generally offering number portability in compliance with the FCC's number portability regulations adopted pursuant to section 251 and is therefore in compliance with Checklist Item 11. In support of its finding, the Authority observed that the record shows BellSouth has been providing permanent local number portability pursuant to the FCC's requirements[46] since November 19, 2001.[47] Further, the Authority noted that the parties presented no evidence contradicting BellSouth's claims of compliance with Checklist Item 11.

Checklist Item 12: Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3)

The Authority unanimously found that BellSouth is providing or generally offering nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) and, therefore, is in compliance with Checklist Item 12. The parties stipulated that BellSouth satisfies the requisites of Checklist Item 12.

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[46] *See In the Matter of Telephone Number Portability*, CC Docket No. 95-116 (*Third Report and Order*) 1998 WL 238481, 13 FCC Rcd. 11,701 (released May 12, 1998).

[47] The Authority observed that Congress had defined number portability as the ability of users of telecommunications services to retain at the same location existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. Without number portability, customers ordinarily cannot change their local companies unless they change their telephone numbers.

During deliberations, the Authority made the following findings. The Authority observed that BellSouth is required to allow CLECs to permit similarly situated telephone exchange service end users to dial the same number of digits to make a local telephone call notwithstanding the identity of the end-user's or the called party's service provider. The Authority then found that the record supported BellSouth's contention that it provides for local and toll dialing parity to CLECs with no unreasonable delays and provides for dialing parity for all originating telecommunications services that require dialing in order to route a call.

The Authority further commented that it had approved BellSouth's Second Revised IntraLATA Toll Dialing Parity Plan with the following modifications: (1) customers shall be notified that they would not automatically be defaulted to a carrier if they had not selected a carrier; and (2) customers shall be required to dial an access code to place intraLATA toll calls until they make an affirmative choice of an intraLATA toll carrier. [48] The Authority observed that BellSouth had amended its plan to include a statement agreeing to comply with all applicable rules of both the FCC and the TRA. The Authority noted that the parties had lodged no complaints regarding post-dial delays, call completion rates, or transmission quality relating to local call dialing parity.

Checklist Item 13: Provision of reciprocal compensation arrangements in accordance with the requirements of 47 U.S.C. § 252(d)(2)

The Authority unanimously found that BellSouth is providing or generally offering reciprocal compensation arrangements in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3) and, therefore, is in compliance with Checklist Item 13.

[48] *See Petition of BellSouth Telecommunications, Inc .for Approval of an IntraLATA Toll Dialing Parity Implementation Plan*, TRA Docket No. 97-01399 (*Order Approving BellSouth Telecommunications, Inc. Second Revised IntraLATA Toll Dialing Parity Plan*) (issued June 22, 1999) p. 7.

Prior to this finding, Director Tate stated that the interconnection agreements on file with this Authority reveal that BellSouth agreed to pay reciprocal compensation consistent with 47 U.S.C. § 251(b)(5). She further noted that, in responding to CLECs' concerns voiced in this proceeding regarding the rate to be paid for tandem switching, BellSouth indicated it would pay the tandem switching rate if the CLEC switch serves a geographic area comparable to BellSouth's tandem switch.[49]

Director Tate commented that BellSouth's statement necessitated the reiteration or clarification of the Authority's mandate regarding this issue. Director Tate stated that in a number of arbitration decisions, the Authority had ordered BellSouth to pay reciprocal compensation at tandem interconnection rates.[50] She observed that the Authority's orders on the issue of reciprocal compensation are consistent with the FCC's recent *Memorandum Opinion and Order* issued on July 17, 2002.[51] The *Memorandum Opinion and Order* states:

> in order to qualify for the tandem rate, a competitive LEC need only demonstrate that its switch serves a geographic area comparable to that of the incumbent LEC's tandem switch. . . The requisite comparison under the tandem rate is whether the competitive LEC's switch **is capable of** serving a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch.[52]

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[49] *See* Pre-Filed Direct Testimony of John Ruscilli (filed April 26, 2002) p. 102.

[50] *See, e.g., Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996,* TRA Docket No. 99-00948 (*Interim Order of Arbitration Award*) p. 12; *Petition of MCIMetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Term and Condition of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996,* TRA Docket No. 00-00309 (*Interim Order of Arbitration Award*) (issued April 3, 2002) pp. 32-34.

[51] *See In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and For Expedited Arbitration,* CC Docket No. 00-218 (*Memorandum Opinion and Order*) 2002 WL 1576912 ¶¶ 304-310; *see also Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (*Notice of Proposed Rulemaking*) 2001 WL 455872, 16 FCC Rcd 9610, 9648, ¶ 105.

[52] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and For Expedited Arbitration,* CC Docket No. 00-218 (*Memorandum Opinion and Order*) 2002 WL 1576912 ¶ 309 (emphasis added).

Director Tate reiterated the Authority's prior conclusion that BellSouth must pay the tandem switching rate if a CLEC's switch is capable of serving an area comparable to BellSouth's tandem switch. Director Tate then moved to find BellSouth in compliance with Checklist Item 13, based on BellSouth's compliance with FCC and TRA orders on reciprocal compensation and payment of the tandem switching rate when a CLEC's switch is capable of serving a geographic area comparable to the area served by BellSouth's tandem.

Checklist Item 14: Telecommunications services are available for resale in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3)

The Authority unanimously voted that BellSouth is providing or generally offering telecommunications services such that they are available for resale in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3) and, therefore, is in compliance with Checklist Item 14. During deliberations on this issue, Director Tate stated that the record is consistent with the conclusion that BellSouth satisfies the requirements of Checklist Item 14. In support of that statement, Director Tate observed that BellSouth had demonstrated that it had entered into numerous resale agreements with competing carriers. She also stated that the record indicates that BellSouth's resale agreements and tariffs are compliant with the resale provisions of the Act as well as the resale requirements of this Authority, including the resale procedures and wholesale discounts in the Avoidable Cost Docket, 97-01331, and the Arbitration Awards Docket, 96-01271 and 96-01152.[53] Director Tate also acknowledged the accuracy of BellSouth's assertion that the FCC does not require BOCs to make nonretail DSL services available for

[53] *See The Avoidable Costs of Providing Bundled Service for Resale by Local Exchange Telephone Companies,* TRA Docket No. 96-01331 (*Final Order*) (issued January 17, 1997); *In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996,* TRA Docket No. 96-01271 (*Second and Final Order of Arbitration Awards*) (issued January 23, 1997); *.In the Matter of the Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252,* TRA Docket No. 96-01152 (*Second and Final Order of Arbitration Awards*) (issued January 23, 1997).

resale as a condition of meeting its resale obligations under the Act. Further, Director Tate noted that the parties had not entered testimony into the record directly contradicting BellSouth's assertion of the compliance.

Director Tate then referred to the testimony of BellSouth's witness John Ruscilli, BellSouth's Senior Director of State Regulatory Affairs, that retail promotions offered for more than 90 days will be made available for resale at the stated tariff rate less the wholesale discount or at the promotional rate.[54] Director Tate expressed her concern that Mr. Ruscilli's position is inconsistent with BellSouth's tariffs and in conflict with the FCC's Local Competition Order,[55] which discussed the determination of the retail rate for the purpose of calculating the wholesale rate and made the determination that rates for short-term promotions of less than 90 days are not considered retail for wholesale obligation purposes. Director Tate stated that the FCC had further elaborated that promotions lasting more than 90 days must be offered for resale with wholesale discounts. Director Tate concluded that the promotional rate offered by BellSouth is considered retail for long-term promotions. She commented that in order for BellSouth to meet its resale obligations under the Act, BellSouth must resell its retail promotions offered for more than 90 days at the promotional rate less the wholesale discount. Director Tate stated that otherwise, BellSouth could effectively shelter selected services from competition through resale by offering long-term promotions or merely renewable short-term promotions.

Director Tate then commented, based upon BellSouth's actions regarding existing promotional tariffs filed with the TRA and not on the testimony of Mr. Ruscilli, that the Authority find BellSouth is in compliance with Checklist Item No. 14.

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[54] *See* Pre-Filed Direct Testimony of John Ruscilli (filed April 26, 2002) p. 107.
[55] *See* Local Competition Order, 1996 WL 452885, 11 FCC Rcd. 15,499, ¶ 950; *see also* 47 C.F.R. § 51.613.

D. Public Interest

The Authority unanimously found that entry by BellSouth into the interLATA long distance market is consistent with "the public interest, convenience, and necessity" in accordance with the Act.[56] The Authority based its finding upon its previous findings during the deliberations, the record,[57] the Georgia/Louisiana Order and the comments of the Department of Justice in the five-state filing, and the Settlement Agreement, which contemplates the adoption of the Florida performance measurements and SEEMs.

Prior to this finding, the Authority acknowledged that some CLECs may have been aggrieved by certain actions by BellSouth, which may be perceived as inappropriate or anticompetitive. The Authority concluded, however, that the record does not support the CLECs' allegation that BellSouth's actions, practices, policies, and overall behavior constitute an impediment to competition in Tennessee. The Authority concluded that the public interest concerns of section 271 were not undermined by BellSouth's business practices.

The Authority then addressed BellSouth's assertion that its win-back strategies are supported by the Act and the FCC.[58] The Authority found BellSouth's position unpersuasive. While acknowledging that the FCC had concluded in its Customer Appropriate Network Information Order that win-back programs are consistent with 47 U.S.C. § 222(c)(1), the Authority observed that the FCC had also found that retention marketing campaigns can harm competition if a carrier uses carrier-to-carrier information such as switch or presubscribed interexchange carrier orders to trigger this type of marketing campaign.[59] The Authority further

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[56] 47 U.S.C. § 271(d)(3)(C).
[57] According to information provided by BellSouth, CLECs have acquired 32.2% of the business lines in Tennessee, which represents the highest percentage of CLEC-controlled business lines in BellSouth's nine-state region.
[58] *See* Pre-Filed Direct Testimony of John Ruscilli (filed April 26, 2002) p. 119.
[59] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115 (*Order on Reconsideration and Petitions for Forbearance*) (released . Aug. 16, 1999) 1999 WL 688467, 14 FCC Rcd. 14,409 ¶ 70 ("Customer Appropriate Network Information Order").

commented that 47 U.S.C. § 222(b) also prohibits a carrier from using carrier proprietary information to retain soon-to-be former customers when the carrier gains notice of the customer's imminent cancellation of service through the provision of carrier-to-carrier service. The Authority concluded that neither the Act nor the FCC's rules provide blanket endorsement to BellSouth's win-back programs, which may be based on marketing strategies that exploit the precarious position of the CLECs in the local exchange market.

The Authority then expressed their understanding that BellSouth has an internal policy in effect in other states requiring it to refrain for ten (10) days from contacting customers who have switched to another carrier. The Authority applauded this policy, and noted their expectations that it would be applied similarly in Tennessee.

The Authority commented that in order to ensure that BellSouth continues to provide competitors with nondiscriminatory access to the items contained in the 14-point checklist following section 271 approval, it is important to implement measures to prevent BellSouth from backsliding. The Authority stated that the most effective way to accomplish this is to implement a set of performance measurements to continually monitor BellSouth's actions in a post-271 environment. According to the Authority, having the Florida performance measures and self-effectuating enforcement mechanisms in place pursuant to the Settlement Agreement will assist the Authority in ascertaining whether BellSouth's provision of interLATA long distance services continues to be in the public interest.

E. Compliance with 47 U.S.C. § 272: Special Provisions Concerning Bell Operating Companies

The Authority unanimously found that BellSouth had sufficiently demonstrated that it is in compliance with the requirements of 47 U.S.C. § 272. The parties stipulated to this issue. The CLECs did not submit evidence contesting BellSouth's compliance.

During deliberations, the Authority observed that in support of its claim of 272 compliance, BellSouth submitted its Articles of Incorporation, a Joint Cost Report for 2001 filed with the FCC through the Automated Reporting and Management Information System ("ARMIS"), and BellSouth's 2001 10K Securities and Exchange Commission filing. The Authority also noted that BellSouth had provided a report from its auditor, Pricewaterhouse Coopers ("PWC") that contains consolidated balance sheets and the consolidated statements of income cash flows and shareholders equity. The Authority stated that this audit presented fairly the financial position of BellSouth and its subsidiaries. The Authority further stated that, given that BellSouth Long Distance ("BSLD") is not a Tier 1 carrier, the PWC audit of the position of BellSouth and its subsidiaries is consistent with 47 C.F.R. § 64.904, which covers all affiliate transactions. The Authority commented additionally that the information BellSouth presented was sufficient to convince the FCC that BellSouth made a prima facie showing that it would comply with section 272, as indicated in the Georgia/Louisiana Order.

F. Conclusion

Based upon the foregoing, the Tennessee Regulatory Authority finds that BellSouth has achieved compliance with 47 U.S.C. § 271 and 47 U.S.C. § 272. In addition, the Authority finds that entry by BellSouth into the interLATA long distance market is consistent with the public interest, convenience, and necessity in accordance with the Federal Telecommunications Act of 1996. Accordingly, the Authority recommends that the FCC approve the application for section 271 approval filed by BellSouth.

Sara Kyle, Chairman

Deborah Taylor Tate, Director

Pat Miller, Director